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In the Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF BOERNE, TEXAS, PETITIONER

v.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO

AND

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*, is a constitutional exercise of Congress's legislative authority under Section 5 of the Fourteenth Amendment.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 73 F.3d 1352. The opinion of the district court (Pet. App. 24a-29a) is reported at 877 F. Supp. 355.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1996. A petition for rehearing was denied on March 28, 1996. Pet. App. 30a-31a. The petition for a writ of certiorari was filed on June 25, 1996, and was granted on October 15, 1996. 117 S. Ct. 293. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions, U.S. Const. Amends. I, X and XIV, and the Religious

Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*, are reproduced in the appendix to this brief.

STATEMENT

1. *Statutory framework*

a. The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless "it demonstrates that application of the burden to the person * * * (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000bb-1. The "exercise of religion" means "the exercise of religion under the First Amendment to the Constitution." 42 U.S.C. 2000bb-2(4).

A person whose rights under RFRA have been violated "may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. 2000bb-1(c).[1] RFRA's mandate applies "to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after" RFRA's enactment. 42 U.S.C. 2000bb-3(a).[2] RFRA does not "affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion." 42 U.S.C. 2000bb-4.

b. Congress enacted RFRA following this Court's decision in *Employment Division, Department of Human*

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[1] RFRA identifies the "government[s]" subject to its terms as any "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State." 42 U.S.C. 2000bb-2(1). RFRA also applies to all territories and possessions of the United States. 42 U.S.C. 2000bb-2(2).

[2] All federal laws enacted after RFRA's passage are subject to its terms "unless such law explicitly excludes such application." 42 U.S.C. 2000bb-3(b).

Resources v. *Smith*, 494 U.S. 872 (1990). *Smith* held that the Free Exercise Clause does not require Oregon to exempt from its criminal drug laws the sacramental ingestion of peyote by members of the Native American Church. *Id.* at 877-882. Under *Smith*, generally applicable laws may be applied to religious exercises even when not supported by a compelling governmental interest. *Id.* at 884-889.

In enacting RFRA, Congress expressed concern about the effect of the *Smith* decision on the exercise of religion and, in particular, on minority religions. 42 U.S.C. 2000bb(a); see S. Rep. No. 111, 103d Cong., 1st Sess. 8 (1993). After holding hearings and collecting evidence, Congress concluded that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." 42 U.S.C. 2000bb (a)(2). See *The Religious Freedom Restoration Act: Hearing Before the Senate Comm. on the Judiciary*, 102d Cong., 2d Sess. 5-6, 63-64 (1992) (*1992 Senate Hearing*) (describing impact of general, neutral laws on Hmongs, Catholics, Mormons, and Jehovah's Witnesses); *Religious Freedom Restoration Act of 1991: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 17-18, 24-25, 123, 408 (1992) (*1992 House Hearings*) (neutral laws impede religious practices of Amish, Jehovah's Witnesses, Catholics, Mormons, and Native Americans); S. Rep. No. 111 at 4-5, 8; H.R. Rep. No. 88, 103d Cong., 1st Sess. 2, 5-6 (1993).

In addition, Congress concluded that legislation was needed to secure for minority faiths the same ability to exercise their religion as more established faiths enjoy, because the former generally lack the political power to obtain legislative accommodations for their exercise. S. Rep. No. 111 at 8; H.R. Rep. No. 88 at 6. Witnesses at the House and Senate hearings repeatedly expressed concern that facially neutral, generally applicable laws would be used as vehicles for discrimination against religion and

religious minorities.[3] Indeed, because religious minorities are also frequently racial or ethnic minorities, witnesses advised that "[t]he civil rights laws are to little avail unless they provide for religious liberty as well as for racial and ethnic justice." *1992 Senate Hearing* 74; see also *id.* at 68-75; *1992 House Hearings* 104, 332-338.

In Congress's judgment, a national response was needed.[4] Congress, accordingly, passed RFRA to establish, as a matter of statutory right, "the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. 2000bb (b)(1). The compelling interest test, Congress concluded, "is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. 2000bb(a)(5). The Attorneys General of 13 States agreed that RFRA "strikes a proper balance" between the needs of religious claimants and governmental regulation. 139 Cong. Rec. S14,351-S14,352 (Oct. 26, 1993).

c. In passing RFRA, Congress relied upon its authority under Section 5 of the Fourteenth Amendment and the Necessary and Proper Clause, Art. I, § 8, Cl. 18. S. Rep. No. 111 at 13-14; H.R. Rep. No. 88 at 9. Members of Congress disavowed any effort to review or reverse this Court's decision in *Smith* or any other case. S. Rep. No. 111 at 9, 14 n.43; H.R. Rep. No. 88 at 7, 15 n.3; 139 Cong. Rec. H2358 (May 11, 1993) (Rep. Hyde). The House and Senate Reports stated that Congress was creating a new statutory right of free exercise in light of this Court's delineation of the First Amendment's scope.

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[3] See *1992 Senate Hearing* 5-7, 27, 30-39, 63-64, 69-71, 74, 129; *1992 House Hearings* 11, 23-25, 104, 107-108, 157-158, 326, 332-338, 398, 406-408.

[4] See H.R. Rep. No. 88 at 6; see generally *1992 Senate Hearing* 64, 95-96, 129; *1992 House Hearings* 11, 25, 104, 123, 150, 357, 398.

S. Rep. No. 111 at 14 n.43; H.R. Rep. No. 88 at 9, 15 n.3.

2. Factual and procedural history

a. P.F. Flores is the Archbishop of San Antonio, Texas, and Saint Peter Catholic Church in Boerne, Texas, is within his Archdiocese. Due to substantial population growth, the Church cannot accommodate all of the parishioners who seek to attend its services. The Church will be unable to accomplish its mission or continue to serve as a parish church unless it expands. J.A. 5, 10. In 1990, Archbishop Flores authorized enlargement of the Church to accommodate those seeking to worship there and to conform the sanctuary's layout to the current liturgical requirements of the Catholic Church. J.A. 6, 9; Pet. App. 2a.

Six months later, petitioner designated a historic district, the boundaries of which bisected the Church. Although the Church, which was built in 1923, was not designated a historic landmark, its facade fell within the historic district. After the Church's request for a building permit was denied, the Church negotiated with petitioner's architect and submitted revised architectural plans that would preserve the facade, while demolishing other parts of the structure. Petitioner rejected the plans. Six months later, petitioner amended its ordinance to include the entire church structure within the historic district. J.A. 6-9, 68, 70-71; Pet. App. 2a.

b. Archbishop Flores filed suit challenging petitioner's denial of the construction permit and alleging, *inter alia*, that petitioner's action violated RFRA because denial of the permit substantially burdened his exercise of religion and was not justified by a narrowly tailored, compelling interest. J.A. 10-12.[5] Petitioner defended in part on the

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[5] The complaint also includes claims under the First, Fifth, and Fourteenth Amendments to the federal Constitution and under the Texas Constitution. Adjudication of these other claims has been stayed by the district court.

ground that RFRA is unconstitutional. Pet. App. 2a-3a. The United States intervened solely to defend the constitutionality of RFRA. *Id.* at 26a.

The district court ruled that RFRA violates the separation of powers. Pet. App. 24a-29a. The court of appeals reversed. *Id.* at 1a-23a. The court concluded that Congress properly exercised its power under Section 5 of the Fourteenth Amendment to enact RFRA because the Act (i) deters governmental violations of the Free Exercise Clause, (ii) limits the application of laws that have the effect of impeding religious exercise, and (iii) protects and equalizes the free exercise rights of minority religions. *Id.* at 10a-15a. The court of appeals also rejected petitioner's separation of powers, Tenth Amendment, and Establishment Clause challenges. The separation of powers argument, the court concluded, "rests on the mistaken assumption that *Smith* describes not only how little the Government *must* accommodate religion but also how much it *may* accommodate it." *Id.* at 17a. With respect to the Tenth Amendment, the court of appeals ruled that "RFRA does not intrude upon state sovereignty any more than the myriad other federal statutes that preempt state regulation." *Id.* at 22a. Finally, the court rejected petitioner's facial Establishment Clause challenge because "RFRA no more advances religion than any other legislatively[] mandated accommodation of the exercise of religion." *Id.* at 21a.

SUMMARY OF ARGUMENT

The central issue in this case concerns the scope of Congress's independent legislative role in enforcing the Fourteenth Amendment's most fundamental guarantees. Petitioner does not question the power of federal courts to create prophylactic rules that enforce Fourteenth Amendment guarantees against the States. Petitioner also acknowledges that States may accord additional protection, beyond the constitutional minimum, to fundamental liberties without offending the authority of the federal judiciary or other constitutional principles. It is only

Congress that petitioner would relegate to the constitutional sidelines. The Constitution's text, however, says otherwise. The Fourteenth Amendment expressly invests *Congress* with the authority to enforce its provisions. For more than a century, this Court has agreed that the enforcement provisions of the Civil War Amendments invest Congress—not the courts and not the States—with broad and unique authority to enforce civil rights. Congress has an independent and central role in identifying incipient threats to the exercise of rights guaranteed by the Fourteenth Amendment and in preventing their realization. That is all RFRA does.

I. RFRA represents a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment.

A. As an initial matter, there is no basis for reconsidering this Court's decision in *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966). Stare decisis counsels strongly against overruling a 30 year-old precedent that is the foundation for the validity of major civil rights legislation. *Morgan*'s holding regarding the scope of congressional power to enforce Fourteenth Amendment guarantees, moreover, comports with Section 5's text and history.

B. When legislating under Section 5, Congress may go beyond simply proscribing conduct that courts would find Section 1 of the Fourteenth Amendment already forbids. Congress may legislate prophylactically and regulate state conduct that creates a risk of constitutional violations and substantially burdens or threatens the exercise of Fourteenth Amendment guarantees. To that end, Congress has the power to safeguard Fourteenth Amendment rights by shielding them with an additional statutory layer of protection. That is what Congress has done here. By erecting a statutory buffer zone around religious exercise, RFRA insulates the core free exercise guarantee against intentional erosion that might otherwise go unremedied, and ensures that minority, unpopular, and emerging faiths enjoy the same freedom as religious adherents who possess the political means to obtain legislative exemptions from

burdensome laws. RFRA, in other words, deters violations of the Free Exercise Clause and promotes equal treatment for all faiths.

II. Petitioner's separation of powers argument proceeds from the mistaken assumption that Congress has supplanted this Court as the final arbiter of the Constitution's requirements. Congress expressly disavowed any attempt independently to interpret the First Amendment. Rather, Congress simply stepped in—as it has done repeatedly in other contexts—and bridged the gap between the tolerance for religion that the First Amendment compels and the protection of religious exercise that Section 5 of the Fourteenth Amendment permits Congress to accord. As such, Congress's prescription of a statutory standard for courts to apply in evaluating a statutory claim for relief transgresses no constitutional boundary between the Legislative and Judicial Branches. True, Congress here chose to enforce the free exercise guarantee by restoring, as a matter of statutory right, a standard of scrutiny that this Court has determined is not constitutionally compelled. But that is not novel. The Voting Rights Act and Title VII of the Civil Rights Act of 1964 do the same thing.

III. Equally unavailing is petitioner's argument that RFRA violates the Establishment Clause. Legislative accommodations that alleviate significant, government-imposed burdens on religious exercise do not violate the Establishment Clause and need not come packaged with equivalent benefits for secular entities. To hold otherwise would condemn numerous state constitutions that also protect religious exercise more than *Smith* does. Indeed, because RFRA protects all religious adherents equally, it averts the potential sectarian discrimination that a piecemeal legislative exemption process risks.

IV. Finally, this Court has repeatedly stressed that federalism concerns have diminished force when Congress acts pursuant to its Fourteenth Amendment power. Under RFRA, petitioner is not obliged to undertake or refrain

from undertaking any particular regulatory activity. RFRA simply requires that, when petitioner's activities substantially burden religious exercise, they will be measured against a reasonable federal standard, specifically calibrated to account for important state interests.

ARGUMENT

Adjudicating the constitutionality of an Act of Congress is "the gravest and most delicate duty that this Court is called upon to perform." *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981). Legislation enacted pursuant to Congress's power under Section 5 of the Fourteenth Amendment, moreover, "present[s] special concerns for judicial review," because "Congress has considerable latitude * * * when it exercises its 'unique remedial powers' " under that Amendment. *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547, 605 (1990) (O'Connor, J., dissenting); see also *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 488-490 (1989) (opinion of O'Connor, J.). The presumption of constitutionality operates with particular force when, as here, Congress specifically considered the constitutionality of its action. H.R. Rep. No. 88 at 9; S. Rep. No. 111 at 14. *Rostker*, 453 U.S. at 64.

I. THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993 IS A CONSTITUTIONAL EXERCISE OF CONGRESS'S AUTHORITY UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT

Section 5 of the Fourteenth Amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." That section is a positive grant of legislative power to Congress, beyond the authority embodied in Article I. *Ex parte Virginia*, 100 U.S. 339, 345 (1880); see also *Croson*, 488 U.S. at 490 (opinion of O'Connor, J.).

A. There Is No Basis For Reconsidering *Katzenbach* v. *Morgan*

1. In *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), this Court recognized that Section 5 is "a positive grant

of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Id.* at 651. In *Morgan,* the Court upheld the statutory ban in the Voting Rights Act of 1965 on the use of literacy tests to prevent persons educated in non-English-speaking (primarily Puerto Rican) schools from voting, 42 U.S.C. 1973b(e), even though a unanimous Supreme Court had previously rejected a facial challenge to the constitutionality of literacy tests. See *Lassiter* v. *Northampton County Bd. of Elections,* 360 U.S. 45 (1959). The Court ruled that Congress's legislative power under Section 5 was not dependent upon a determination by the judiciary that the particular state action subject to the exercise of that power violates Section 1 of the Fourteenth Amendment. *Morgan,* 384 U.S. at 648. To hold otherwise, the Court reasoned, would "depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment" and would confine Congress "to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the 'majestic generalities' of § 1 of the Amendment." *Id.* at 648-649.

The literacy ban constituted "appropriate legislation" within the meaning of Section 5 for two reasons. First, Congress could have determined that Puerto Ricans faced a risk of discrimination in the provision of government services, and that an increase in voting would help combat such discrimination. *Morgan,* 384 U.S. at 652-653. *Morgan* thus held that Section 5 empowers Congress to enact remedial and prophylactic measures that reasonably effectuate and protect against the diminution of constitutional rights. Second, *Morgan* held that Congress could have employed its "specially informed legislative competence" to conclude, as a factual matter, that the specific literacy test at issue did not promote legitimate governmental goals, but instead was a guise for invidious racial discrim-

ination. *Id.* at 653-656. Thus, *Morgan* held that Congress has independent authority to identify and invalidate specific governmental practices when it determines as a factual matter that they violate Section 1 of the Fourteenth Amendment under the standards announced by this Court.

2. Although petitioner asks this Court to "definitively inter[]" *Morgan*'s "substantive power theory" (Pet. Br. 42), it is unclear to which aspect of *Morgan* petitioner objects, because the language from *Morgan* that petitioner attacks (Br. 38) appears only in a footnote that precedes the Court's articulation of both rationales. 384 U.S. at 651 n.10. If petitioner is challenging *Morgan*'s holding that Congress may prohibit a specific state action or law because Congress independently has determined that it actually violates the Fourteenth Amendment, this case presents no occasion to revisit that question. Through RFRA, Congress did not determine that any specific state or local law constituted an invidious discrimination against religion. See H.R. Rep. No. 88 at 7; *id.* at 15 n.3 (additional views); S. Rep. No. 111 at 9, 14 n.43.

If, instead, petitioner challenges *Morgan*'s holding that Congress's enforcement power includes the authority to increase the security of Fourteenth Amendment guarantees by adding a statutory layer of protection beyond the floor set by the Constitution, petitioner's argument should be rejected as inconsistent with Section 5's plain language and legislative history, as well as with principles of stare decisis.

a. Section 5 of the Fourteenth Amendment provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." At the time of the Fourteenth Amendment's ratification, a common understanding of the term "enforce"—especially in the context of "enforcing a law"—was "to invigorate," "to strengthen," "[t]o give force to," and "[t]o cause to have force and effect." [6] While the amici States correctly note

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[6] 1 N. Webster, *An American Dictionary of the English Language* 447 (1865); A. English, *A Dictionary of Words and*

(Br. 12-13) that the *tenth* definition of "enforce" in the *Oxford English Dictionary* is "[t]o compel, constrain, oblige," the *first* definition is "[t]o put force or strength into," such as "[t]o strengthen (a fortress) by extra works." 3 *Oxford English Dictionary* 171 (1933);[7] see also Cong. Globe, 42d Cong., 2d Sess. 728 (1872) (Sen. Sumner) (noting "the vivacity" of the word "enforce" and "the energy of that expression").

Those definitions comport with ordinary usage of the term "enforce." Members of this Court have frequently characterized judicially created prophylactic rules as "enforcing" constitutional guarantees, even where such rules are not constitutionally compelled. *E.g., Colorado* v. *Connelly*, 479 U.S. 157, 166 (1986) (exclusionary rule); *United States* v. *Payner*, 447 U.S. 727, 733 (1980) (same).[8]

b. The legislative history of the Fourteenth Amendment confirms that Section 5 vests Congress with independent and broad authority to protect against—not just remedy—violations of the Fourteenth Amendment's guarantees.[9] Upon introducing the Fourteenth Amendment in

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Phrases 322 (1899); *Webster's New International Dictionary* 725 (1917).

[7] See also J. Murray, *A New English Dictionary* 171 (Oxford 1897) (same).

[8] See also *Segura* v. *United States*, 468 U.S. 796, 828 n.22 (1984) (Stevens, J., dissenting); *United States* v. *Mandujano*, 425 U.S. 564, 588 (1976) (Brennan, J., concurring in the judgment) (*Miranda* rule). Likewise, enforcement of the laws goes beyond simply arresting criminals after the fact; it includes preemptive measures, such as security x-rays, check points, and roving patrols, which prevent violations from occurring in the first place. Borders are enforced not just by arresting persons after they enter, but also by erecting fences that protect against unlawful intrusions. RFRA is just that—a protective fence around the Fourteenth Amendment's free exercise guarantee.

[9] This Court has previously rejected the argument of amicus Clarendon Foundation (Br. 5-12; States Br. 14-15) that changes in language from the initial draft to the adopted version of the

the Senate, Senator Howard explained that Section 5 was necessary to empower Congress to give "full effect" to the "bill of rights in the Constitution" and to ensure that "these great fundamental guarantees" are "effectuated and enforced, as they assuredly ought to be"; Section 5 was deemed "a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866); see also *ibid.* (Section 5 "gives [Congress] authority to pass laws which are appropriate to the attainment of the great object of the amendment"); *id.* at 2768 (Section 5 "casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in good faith").[10]

Fourteenth Amendment reflect an intent to narrow the enforcement power. *Morgan*, 384 U.S. at 650 n.9; see also Cong. Globe, 42d Cong., 1st Sess. App. 83 (1871) (Rep. Bingham). Indeed, even those who opposed the initial draft on the ground that it conferred too much power in Congress did not understand the language changes to restrict the reach of the enforcement power. See Cong. Globe, 43d Cong., 2d Sess. 979 (1875) (Rep. Hale) (opponent of initial draft characterizes adopted version as containing an "absolute" and "broad" enforcement power authorizing Congress to "legislat[e] in the first instance" and to "select in [its] own discretion all measures appropriate to the end in view").

[10] See also Cong. Globe, 39th Cong., 1st Sess. 2961 (1866) (Sen. Poland). Debates by the same Congress over the enforcement clause of the Thirteenth Amendment support an equally generous interpretation of congressional power. *Id.* at 1159 (Rep. Windom) (the "broad grant of power" in Section 2 "was made to enable Congress to enforce the spirit as well as the letter of the amendment"), 322 (Sen. Trumbull) (Section 2 empowers Congress "to carry into effect the article prohibiting slavery * * *; and it is for Congress to adopt such appropriate legislation as it may think proper, so that it be a means to accomplish the end"), 1124 (Rep. Cook) ("Congress must judge as to what legislation is appropriate and necessary"). The enforcement clause of the Fourteenth Amendment should be construed commensurately with the Thirteenth. See *City of Rome* v. *United States*, 446 U.S. 156, 175-177 (1980); *id.* at 208 n.1 (Rehnquist, J., dissenting) (citing additional cases); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 443-444 (1968).

During debate over the Ku Klux Klan Act of 1871, the Fourteenth Amendment's principal drafter, Rep. Bingham, explained that, under that Amendment, Congress can "in advance provide against the denial of rights by States." Cong. Globe, 42d Cong., 1st Sess. App. 85 (1871). "Are not laws preventive," Bingham asked, "as well as remedial and punitive?" *Ibid.*[11] Similarly, while debating the Civil Rights Act of 1875, Senator Carpenter deemed "nonsense" the argument that Congress's parallel power under the Fifteenth Amendment was confined to declaring that no State shall violate the Amendment. "[T]he Constitution declares it already, and no legislation is required for that." Cong. Globe, 43d Cong., 1st Sess. 4085 (1874). Rather, he stated, the enforcement power permits Congress "to carry out the substantial end, to act affirmatively, and to see not only that the State did not do it negatively, but that we might see that the fact itself, the right to vote, should be enjoyed." *Ibid.*

c. The political background against which the Civil War Amendments were adopted readily explains their framers' desire to carve out an independent role for Congress in securing Fourteenth Amendment liberties. Congress, of course, was unwilling to rely upon the States to secure their residents' rights. See, *e.g.*, S. Exec. Doc. No. 2, 39th Cong., 1st Sess. (1865) (Schurz Report on the post-war condition of the confederate states). Nor was Congress inclined to leave sole authority for the protection of liberties in the hands of the same federal judiciary

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[11] See also Cong. Globe, 42d Cong., 1st Sess. 375 (1871) (Rep. Lowe) ("But if this section [5] is nothing more than a negation, a veto of State acts, where is the room for legislation? * * * Nothing can well be more evident than that, taking the first and fifth sections together, the intention was to enable Congress * * * to secure to citizens the actual enjoyment of the rights and privileges guarantied."). Debates over proposed civil rights legislation in 1872 again stressed the investiture of preventative power in Congress. Cong. Globe, 42d Cong., 2d Sess. 728 (1872) (Sen. Sumner) ("Whatever will fortify [Section 1 rights] is within the power of Congress."), 761 (Sen. Carpenter).

that, less than a decade earlier, had constricted congressional power to contain the spread of slavery. See *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393, 436-452 (1857); see also *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869). Consistent with traditional notions of checks and balances, Congress chose to multiply the institutions capable of protecting federal rights, rather than rely exclusively on any single institution. The Civil War Amendments thus made Congress an independent guarantor of constitutional liberties. As this Court recognized in *Ex parte Virginia*: "It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. * * * It is the power of Congress which has been enlarged." 100 U.S. at 345 (emphasis in original). *Morgan* correctly affirmed this.[12]

d. Overruling *Morgan* would be "a matter of no small import, for the doctrine of *stare decisis* is of fundamental importance to the rule of law." *Payne* v. *Tennessee*, 501 U.S. 808, 842 (1991) (Souter, J., concurring) (internal quotation marks omitted). Stare decisis is "a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.'" *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172 (1989) (quoting The Federalist No. 78, at 490 (A. Hamilton) (H. Lodge ed. 1888)). Petitioner thus must "go beyond mere demonstration that [*Morgan*] was wrong (otherwise the doc-

[12] That the federal courts and States now share in the important task of protecting fundamental rights does not change the fact that the constitutional text at issue here was written to make Congress an independent and proactive force in protecting Fourteenth Amendment liberties. See *United States* v. *Price*, 383 U.S. 787, 801 n.9 (1966) ("It would be strange, indeed, were this Court to revert to a construction of the Fourteenth Amendment which would once again narrow its historical purpose—which remains vital and pertinent to today's problems.").

trine would be no doctrine at all)." *Hubbard* v. *United States*, 115 S. Ct. 1754, 1765 (1995) (Scalia, J., concurring in part and concurring in the judgment); see also *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833, 864 (1992).

Petitioner, however, has identified no "special justification" for abandoning *Morgan*. *United States* v. *International Business Machines Corp.*, 116 S. Ct. 1793, 1801 (1996). Neither petitioner nor its amici contend that *Morgan* is "unworkable" or has caused significant confusion or uncertainty in the law. See *Casey*, 505 U.S. at 854. Nor are there any new facts or legal developments that could justify reconsideration of *Morgan*'s holding that Congress can enhance statutorily the protection accorded Fourteenth Amendment guarantees. See *id.* at 855.

Finally, principles of stare decisis apply with particular force because Congress has relied on *Morgan*'s rationale as the foundation for a panoply of civil rights legislation that has transformed this nation. *Hubbard*, 115 S. Ct. at 1764 (opinion of Stevens, J.); *Casey*, 505 U.S. at 854-855. The Voting Rights Act and its amendments, Title VII, and numerous other provisions of the Civil Rights Acts are premised upon congressional power to enhance statutorily the level of protection afforded Fourteenth Amendment guarantees. See, *e.g.*, *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989) (reaffirming 42 U.S.C. 1981's prohibition on private racial discrimination); *City of Rome* v. *United States*, 446 U.S. 156 (1980) (upholding preclearance provisions of the Voting Rights Act); *id.* at 215 (Rehnquist, J., dissenting) (Section 5 power is "constitutionally overinclusive"); *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976) (upholding application of Title VII to the States); *Oregon* v. *Mitchell*, 400 U.S. 112 (1970) (upholding portions of the Voting Rights Act Amendments of 1970); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 417-444 (1968) (42 U.S.C.

1982 upheld as constitutional); *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966) (rejecting constitutional challenge to the Voting Rights Act).

B. RFRA Is "Appropriate Legislation" To Enforce The Fourteenth Amendment

Although Congress's power under Section 5 is broad, it is not without limits. This Court has established a three-part test for determining whether legislation enacted pursuant to Congress's Section 5 power is "appropriate." First, the legislation must enforce a right guaranteed by the Fourteenth Amendment. Second, the legislation must be "plainly adapted to that end." Third, the legislation may not transgress any other constitutional limitations. See *Morgan*, 384 U.S. at 651; see also *Rome*, 446 U.S. at 176-178; *Oregon*, 400 U.S. at 124-131 (Black, J.) (Section 5 power may not override express textual reservation of power to the States to regulate voting qualifications for state elections). RFRA satisfies each of those requirements.[13]

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[13] In addition to the court of appeals in this case, virtually every court to address the question has upheld RFRA's constitutionality. *Sasnett* v. *Sullivan*, 91 F.3d 1018 (7th Cir. 1996), petition for cert. pending, No. 96-710; *EEOC* v. *Catholic Univ.*, 83 F.3d 455, 469-470 (D.C. Cir. 1996) (rejecting constitutional authority, separation of powers, and Establishment Clause challenges to RFRA as applied to federal law); *Rouser* v. *White*, Civ. No. S-93-767 LKK/GGH P, 1996 WL 631130 (E.D. Cal. Oct. 28, 1996); *Lindsey* v. *Vaughn*, No. 93-2030 (E.D. Pa. Aug. 15, 1996); *Jews for Jesus, Inc.* v. *Hillsborough County Aviation Auth.*, No. 95-1347 (M.D. Fla. Apr. 8, 1996), slip op. 3, appeal pending, No. 96-2468 (11th Cir.); *Abordo* v. *Hawaii*, 902 F. Supp. 1220, 1229-1234 (D. Haw. 1995); *Muslim* v. *Frame*, 891 F. Supp. 226, 229 n.2 (E.D. Pa. 1995) (dicta); *Belgard* v. *Hawaii*, 883 F. Supp. 510, 512-517 (D. Haw. 1995); *Phipps* v. *Parker*, 879 F. Supp. 734, 736 (W.D. Ky. 1995); *Campos* v. *Coughlin*, 854 F. Supp. 194, 204 n.7 (S.D.N.Y. 1994) (dicta); *South Jersey Catholic Sch. Teachers Ass'n* v. *St. Teresa of the Infant Jesus Church Elementary Sch.*, 675 A.2d 1155, 1166-1167 (N.J. Super. Ct. App. Div.), certification granted, 683 A.2d 1162 (N.J. 1996) (Table); *State* v. *Miller*, 538 N.W.2d 573, 576-

1. *RFRA Enforces Both The Due Process And Equal Protection Clauses Of The Fourteenth Amendment*

a. The right to free exercise of religion guaranteed by the First Amendment is a component of the "liberty" protected by the Fourteenth Amendment against state infringement. *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940). Accordingly, the Fourteenth Amendment's Due Process Clause "impose[s] the same substantive limitations on the States' power to legislate that the First

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577 (Wis. Ct. App. 1995), aff'd, 549 N.W.2d 235 (Wis. 1996); see also *United States* v. *Bauer*, 84 F.3d 1549, 1558 (9th Cir.) (RFRA case acknowledging Congress's power and prior practice of protecting "the great guarantees of the Bill of Rights," including First Amendment rights), cert. denied, 117 S. Ct. 267 (1996); *In re Young (Christians v. Crystal Evangelical Free Church)*, 82 F.3d 1407, 1417 (8th Cir. 1996) ("This circuit * * * has at least implicitly held that the RFRA is constitutional."), petition for cert. pending, No. 96-437; see generally D. Ackerman, *The Religious Freedom Restoration Act of 1993: A Legal Analysis*, Congressional Research Service, at 34-35 (Apr. 23, 1993); M. Pawa, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment*, 141 U. Pa. L. Rev. 1029, 1061 (1993); B. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. Cal. L. Rev. 589 (1996); D. Laycock, *RFRA, Congress, and the Ratchet*, 56 Mont. L. Rev. 145 (1995); D. Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. Rev. 221, 245-254. But see *In re Hodge*, 200 B.R. 884, 899-902 (Bankr. D. Idaho 1996); *Keeler* v. *Mayor & City Council of Cumberland*, 928 F. Supp. 591, 595-604 (D. Md. 1996); *In re Tessier*, 190 B.R. 396, 405-407 (Bankr. D. Mont. 1995), appeal dismissed as moot, No. MT-95-2336 (9th Cir. Bankr. App. Panel May 7, 1996), appeal pending, No. 96-35801 (9th Cir.); *Hamilton* v. *Schriro*, 74 F.3d 1545, 1559-1570 (8th Cir. 1996) (McMillian, J., dissenting); *Smith* v. *Fair Employment & Housing Comm'n*, 913 P.2d 909, 937-939 (Cal. 1996) (Mosk, J., concurring) (finding RFRA unconstitutional in case where issue was neither briefed nor argued), petition for cert. pending, No. 96-31.

Amendment had always imposed on the Congress's power." *Wallace* v. *Jaffree*, 472 U.S. 38, 49 (1985).[14]

Congress's express purpose in enacting RFRA was to protect and enforce this free exercise guarantee. 42 U.S.C. 2000bb(b); S. Rep. No. 111 at 14 n.43; see also *Swanner* v. *Anchorage Equal Rights Comm'n*, 115 S. Ct. 460, 462 (1994) (Thomas, J., dissenting from denial of certiorari). Congress found that existing law and governmental practices threatened unduly to obstruct or impede the free exercise of religion. 42 U.S.C. 2000bb(a).[15] Congress also expressed concern that facially neutral laws could be used to target minority or unpopular religions, and that such constitutional violations might escape detection under *Smith*. H.R. Rep. No. 88 at 6; see *1992 Senate Hearing* 68-71.

b. Unlike petitioner (Br. 41 n.11), this Court "ha[s] no doubt of the power of Congress to enforce * * *

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[14] Because RFRA enforces a fundamental Fourteenth Amendment guarantee, this case presents no occasion to decide the scope of Congress's Section 5 power beyond those fundamental guarantees or suspect classes that merit heightened protection under the Amendment. Compare *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 574 (1993) (Souter, J., concurring in part and concurring in the judgment) (Constitution accords "special protection to the exercise of religion"); *Smith*, 494 U.S. at 895 (O'Connor, J., concurring in the judgment) (religious liberty "occupies a preferred position"); and *Wallace*, 472 U.S. at 50 n.35, 53 n.37 (same), with *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 16 n.12 (1981) (questioning congressional power to enforce a right to treatment in the least restrictive setting); *Oregon*, *supra* (Congress lacks authority to reduce voting age in state elections from 21 to 18); and *United States* v. *Reese*, 92 U.S. 214, 217-222 (1875) (Fifteenth Amendment legislation must be connected with discrimination on the basis of "race, color, or previous condition of servitude").

[15] See also S. Rep. No. 111 at 4-5, 8 (Congress finds "a climate in which the free exercise of religion is jeopardized"); H.R. Rep. No. 88 at 5 (Congress finds "a climate in which the free exercise of religion is continually in jeopardy"); 139 Cong. Rec. H2361 (May 11, 1993) (Rep. Hoyer) ("churches have no more constitutional rights than adult movie theaters").

every right guaranteed by the Due Process Clause of the Fourteenth Amendment." *United States* v. *Price*, 383 U.S. 787, 789 (1966) (internal quotation marks omitted).[16] Nor is there any basis for concluding that Congress's enforcement powers are diminished when it enforces rights guaranteed by the Due Process Clause rather than the Equal Protection Clause. Section 5's plain text admits of no such distinction. "The fourteenth amendment closes with the words, 'the Congress shall have power to enforce, by appropriate legislation, the provisions of this article'—the whole of it, sir; all the provisions of the article; every section of it." Cong. Globe, 42d Cong., 1st Sess. App. 83 (1871) (Rep. Bingham); see also *Oregon*, 400 U.S. at 143-144 (Douglas, J.) ("Certainly there is not a word of limitation in § 5 which would restrict its applicability to matters of race alone.").

Section 5's legislative history confirms that the enforcement power extends to rights incorporated in the Due Process Clause. When Senator Howard introduced the Fourteenth Amendment on the Senate floor, he expressly referred to Congress's ability to enforce and "carry out all the principles of all these guarantees," which include "the personal rights guarantied and secured by the first eight amendments of the Constitution." Cong. Globe, 39th Cong., 1st Sess. 2765, 2766 (1866); see also Cong.

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[16] See also 42 U.S.C. 1983, 1988, 2000aa; 18 U.S.C. 241, 242, 247; *Maher* v. *Gagne*, 448 U.S. 122, 130-133 (1980) (remedying statutory violation brought in conjunction with due process and equal protection claims); *Hutto* v. *Finney*, 437 U.S. 678, 693-695 (1978) (enforcing Eighth Amendment through award of attorneys' fees); *Oregon*, 400 U.S. at 147-150 (Douglas, J.) (ban on residency requirements falls within Section 5 power), 236-239 (Brennan, White & Marshall, JJ.) (Section 5 power can enforce right to travel between States), 285-287 (Stewart, J., joined by Burger, C.J., & Blackmun, J.) (same); J. Stevens, *The Bill of Rights: A Century of Progress*, 59 U. Chi. L. Rev. 13, 20 (1992) ("[T]he Liberty Clause[] in the Fourteenth Amendment has transformed the Bill of Rights from a mere constraint on federal power into a source of federal authority to constrain state power.")

Globe, 42d Cong., 1st Sess. App. 84 (1871) (after reading the first eight Amendments into the record verbatim, Rep. Bingham explains that "[t]hese eight articles * * * never were limitations upon the power of the States, until made so by the fourteenth amendment," and that they "may be enforced under existing laws of Congress, and such other laws for their better enforcement as Congress may make").[17] Thus, if petitioner wishes to rewrite Section 5 to limit it to "the provisions of this article pertaining to equal protection," its proper recourse is through a constitutional amendment.

The protection of religious exercise against state action, moreover, was a specific concern of Congress at the time the Fourteenth Amendment was enacted. The South's suppression of African-based slave religions and persecution of church-based abolitionist movements through the use of general laws were frequently discussed by supporters of the Fourteenth Amendment.[18] The Schurz Report,

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[17] See also Cong. Globe, 39th Cong., 1st Sess. 2768 (1866) (Sen. Howard) (Section 5 "gives to Congress power to enforce by appropriate legislation all the provisions of this article of amendment" and charges Congress with ensuring "that all the sections of the amendment are carried out"); Cong. Globe, 42d Cong., 1st Sess. App. 83 (1871) (Rep. Bingham) (Section 5 confers power "to enforce this [equal protection clause] and every other provision of this article"), 69 (Rep. Shellabarger).

[18] See, *e.g.*, Cong. Globe, 38th Cong., 1st Sess. 1202 (1864) (Rep. Wilson) (noting the South's "bitter, cruel, relentless persecutions of the Methodists"); Cong. Globe, 38th Cong., 2d Sess. 138 (1865) (Rep. Ashley) (the South "has silenced every free pulpit within its control, and debauched thousands which ought to have been independent"); Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (Sen. Trumbull) (decrying law that criminalized "exercising the functions of a minister of the Gospel [by] free negroes"); Cong. Globe, 42d Cong., 1st Sess. App. 85 (1871) (Rep. Bingham) ("[The States] restricted the rights of conscience, and he had no remedy. * * * Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of right as these * * *?"), 84 (Fourteenth Amendment will prevent laws that penalize "teaching the Indian to read the lessons

which Congress ordered to document conditions in the former confederate states after the war, noted a number of instances of religious persecution, including some through the use of facially neutral laws. S. Exec. Doc. No. 2 at 81 (Southerners have invoked noise regulations to "suppress the religious meetings among the colored people"), 85 (planters propose regulations authorizing only ordained ministers to preach and imposing a 10:00 p.m. curfew on meetings, in order to suppress worship services of freed slaves), 100 ("[T]here is such a general expression of contempt for negro religion, and such a desire to suppress it, if possible, that it seems as if the whites thought it a piece of terrible impertinence for the blacks to worship the same God that we do.").[19] In seeking to end such practices, Congress was not exclusively motivated by its general concern abut racial discrimination; Congress had an independent desire to assure the free exercise of religion for all citizens, including Nor-

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of the New Testament"), 310 (Rep. Maynard) (rights secured by the Fourteenth Amendment include freedom of religion); Cong. Globe, 42d Cong., 1st Sess. 428 (1871) (Rep. Beatty) (citing the "sworn testimony of ministers of the Gospel who have been scourged because of their political opinions"); Cong. Globe, 42d Cong., 2d Sess. 759 (1872) (Sen. Carpenter), 847-848 (Sen. Frelinghuysen), 898 (Sen. Morton); see also *1992 House Hearings* 332; K. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 Nw. U. L. Rev. 1106 (1994).

[19] See also S. Exec. Doc. No. 2 at 26 (citing instances of burning of "churches in which colored people assembled to worship," threats of assassination against "colored preachers," and murders of Northern preachers), 58 (same), 69 ("[O]ne man was taken out of bed and killed because * * * he was a preacher."), 72 ("[T]heir humble worship of God is construed as a designing plot to rise against the citizens who oppress them."), 82 (freed slaves need "the free exercise of their right to worship God"), 93 (zoning Negro churches out of town and requiring special permits for Negro preachers), 94 (same, limiting Negroes to attendance at services conducted by white ministers), 95 (same).

therners who had migrated to the South (such as abolitionists) and Union loyalists.[20]

This Court, moreover, has previously upheld exercises of Congress's enforcement power outside of the Equal Protection Clause. In *Oregon* v. *Mitchell*, this Court upheld Congress's ban on durational residency requirements for voting, 42 U.S.C. 1973aa-1(a)(5), which was expressly designed to enforce the Due Process Clause. And this Court did so without separately deciding that the residency requirement was unconstitutional. 400 U.S. at 285-287 (Stewart, J., joined by Burger, C.J., & Blackmun, J.), 236-239 (Brennan, White & Marshall, JJ.), 147-150 (Douglas, J.). In fact, a year earlier, the Court had upheld a similar residency requirement against constitutional challenge. *Drueding* v. *Devlin*, 380 U.S. 125 (1965) (mem.); see also *Carrington* v. *Rash*, 380 U.S. 89, 91 (1965). Similarly, in *Hutto* v. *Finney*, 437 U.S. 678 (1978), this Court upheld Congress's authority under Section 5 to provide for attorney's fees to enforce the Eighth Amendment, without first finding that the State's punitive isolation policy violated the Eighth Amendment. *Id.* at 687-688; see also *id.* at 710 (Rehnquist, J., dissenting).

Indeed, there is great irony to petitioner's and its amici's argument that Congress cannot enforce the guarantees of the Due Process Clause. This Court has promulgated a number of prophylactic rules designed to enforce Fourteenth Amendment guarantees against the States. See *Michigan* v. *Jackson*, 475 U.S. 625, 632-636 (1986) (protection of Sixth Amendment right to counsel); *North Carolina* v. *Pearce*, 395 U.S. 711, 723-726 (1969) (procedures to protect against vindictiveness in sentencing after second trial); *Anders* v. *California*, 386 U.S. 738

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[20] See S. Exec. Doc. No. 2 at 26, 63, 77, 83-84, 91, 100, 103; A. Avins, *Fourteenth Amendment Limitations on Banning Racial Discrimination: The Original Understanding*, 8 Ariz. L. Rev. 236 (1967) (cataloguing legislative history); cf. *Monell* v. *Department of Social Servs.*, 436 U.S. 658, 683, 685 & n.45 (1978).

(1967) (appellate duties of counsel for indigent criminal defendants); *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Mapp* v. *Ohio*, 367 U.S. 643 (1961) (exclusionary rule); cf. *Gooding* v. *Wilson*, 405 U.S. 518, 520-521 (1972) (overbreadth doctrine).[21] States, likewise, enjoy the authority to accord individuals greater civil liberties and protections than the federal Constitution compels. *Greene* v. *Georgia*, No. 96-5369 (Dec. 16, 1996), slip op. 2 (per curiam) (to be reported at 117 S. Ct. 578); *Smith*, 494 U.S. at 890; *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 81 (1980). Under petitioner's proposed construction of Section 5, then, the only institution incapable of prophylactically protecting the Fourteenth Amendment's guarantees is Congress—the very entity that the Amendment's text expressly designates to enforce its provisions. Cf. *Croson*, 488 U.S. at 488 (opinion of O'Connor, J.) ("[I]n no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress" when enforcing the Fourteenth Amendment.) (citation, emphasis omitted); *Ex parte Virginia*, 100 U.S. at 345 ("It is the power of Congress which has been enlarged."); see also *Missouri* v. *Jenkins*, 115 S. Ct. 2038, 2061 (1995) (O'Connor, J., concurring) (Congress has an independent role in determining "whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.").

c. RFRA also enforces the Fourteenth Amendment's Equal Protection Clause by protecting against religious discrimination, whether veiled behind generally applicable

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[21] See also *McNeil* v. *Wisconsin*, 501 U.S. 171, 176 (1991) (*Miranda* "established a number of prophylactic rights"); *Michigan* v. *Harvey*, 494 U.S. 344, 345 (1990) (*Jackson* "established a prophylactic rule"); *Pennsylvania* v. *Finley*, 481 U.S. 551, 555 (1987) ("*Anders* established a prophylactic framework"); *Stone* v. *Powell*, 428 U.S. 465, 486 (1976) (exclusionary rule "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect") (citation omitted); *Michigan* v. *Payne*, 412 U.S. 47, 51 (1973) (characterizing *Pearce*'s limitations as prophylactic measures).

laws or resulting from disparate legislative accommodations, that might otherwise go undetected. Like race, gender, and ethnicity, religious affiliation is among the suspect classifications traditionally protected by the Equal Protection Clause. See, *e.g.*, *United States* v. *Batchelder*, 442 U.S. 114, 125 n.9 (1979); *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962); see also *Board of Educ. of Kiryas Joel Village Sch. Dist.* v. *Grumet*, 114 S. Ct. 2481, 2504 (1994) (Kennedy, J., concurring in the judgment). RFRA's legislative history amply documents its equal protection component and, in particular, congressional concern that, in light of *Smith*, courts will be unable to provide sufficient protection against religious discrimination and the inequitable treatment of religious minorities. See S. Rep. No. 111 at 8; H.R. Rep. No. 88 at 6.[22]

Furthermore, because religious minorities are also frequently racial or ethnic minorities (such as Cubans, Native Americans, Arabs, Asians), preventing religious discrimination promotes the historic goal of eliminating racial and ethnic discrimination. Indeed, because of the overlap between racial or ethnic minorities and religious minorities, Congress could reasonably conclude that "[t]he civil rights laws are to little avail unless they provide for religious liberty as well as for racial and ethnic justice." *1992 Senate Hearing* 74; see also *id.* at 68-75; *1992 House Hearings* 104, 332-338; cf. *Shaare Tefila Congregation* v. *Cobb*, 481 U.S. 615, 616-618 (1987) (desecration of Jewish synagogue may be basis for racial discrimination suit under 42 U.S.C. 1982).[23]

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[22] See also *1992 Senate Hearing* 5-7, 27, 30-39, 63-64, 69-71, 74, 129; *1992 House Hearings* 11, 23-25, 104, 107-108, 157-158, 326, 332-338, 398, 406-408.

[23] See also H.R. Rep. No. 621, 104th Cong., 2d Sess. 4 (1996) (Church Arson Prevention Act of 1996, Pub. L. No. 104-155, 110 Stat. 1392, will "make it easier to punish those whose racial, ethnic or religious animus lead[s] them to destroy religious property").

2. *RFRA Is Plainly Adapted To Enforcing The Fourteenth Amendment's Free Exercise Guarantee And The Equal Protection Clause*

Like Congress's broad authority under the Necessary and Proper Clause, congressional authority under Section 5 encompasses all legislation reasonably designed to enforce the guarantees of the Fourteenth Amendment:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Ex parte Virginia, 100 U.S. at 345-346.[24] Legislation enacted pursuant to Congress's Section 5 authority is valid if the court can "discern some legislative purpose or factual predicate that supports the exercise of that power." *EEOC* v. *Wyoming*, 460 U.S. 226, 243 n.18 (1983). Congress's determination that RFRA is necessary to enforce the Fourteenth Amendment is thus reviewed for reasonableness. *Fullilove* v. *Klutznick*, 448 U.S. 448, 477 (1980) (opinion of Burger, C.J.); *Jones*, 392 U.S. at 440-444.[25] Because RFRA (i) prophylacti-

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[24] See also *Rome*, 446 U.S. at 175; *Strauder* v. *West Virginia*, 100 U.S. 303, 311 (1880); cf. *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

[25] Petitioner's argument that Congress did not compile sufficient factual findings is wrong as a matter of both law and fact. First, "Congress is not expected to act as though it were duty bound to find facts and make conclusions of law. The creation of national rules for the governance of our society simply does not entail the same concept of recordmaking that is appropriate to a judicial or administrative proceeding." *Fullilove*, 448 U.S. at 502 (Powell, J., concurring); see also *United States* v. *Lopez*, 115 S. Ct. 1624, 1631 (1995) ("Congress need [not] make particularized findings in order to legislate.") (citation omitted). Second, Congress did

cally deters governmental action that would violate the Free Exercise Clause, (ii) equalizes the protection afforded all religions and, in particular, minority faiths, and (iii) protects against governmental encroachment that has the effect of impeding religious exercise, RFRA is "plainly adapted" to enforcing the Fourteenth Amendment's free exercise and equal protection guarantees.[26]

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compile an extensive record of hearing testimony, committee reports, and congressional debates in the course of enacting RFRA. See pp. 3-5, *supra*. That record far surpasses what Congress compiled in the course of enacting other Section 5 legislation. See *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 67 (1986); *Fullilove*, 448 U.S. at 458-462 (opinion of Burger, C.J.); *Oregon*, 400 U.S. at 216 (Harlan, J.); *Morgan*, 384 U.S. at 669 & n.9 (Harlan, J., dissenting) (literacy test ban added to statute on the floor of Congress). Likewise, petitioner's argument that there was insufficient evidence of a risk of unconstitutional conduct by States is wrong as a factual matter, see pp. 26-35, and misunderstands the law. See *Oregon*, 400 U.S. at 133-134 (Black, J.), 147 (Douglas, J.), 216-217 (Harlan, J.), 233-236 (Brennan, White & Marshall, JJ.), 283-284 (Stewart, J., joined by Burger, C.J., & Blackmun, J.) (nationwide ban on literacy tests upheld despite geographically limited evidence of abuse); *Rome*, 446 U.S. at 172 (application of voting preclearance requirements upheld even though no discriminatory purpose underlay adoption of city's electoral system); see also *id.* at 190 (Stevens, J., concurring) ("that the city of Rome has been innocent of any wrongdoing for the last 17 years is irrelevant"). Indeed, Congress extended Title VII's ban on gender discrimination, which included protection against employment practices with a disparate impact, to the States in 1972—a full year before this Court first expressly held that the Equal Protection Clause imposes heightened scrutiny on gender discrimination. See *Frontiero* v. *Richardson*, 411 U.S. 677, 682-688 (1973) (opinion of Brennan, J.); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Fitzpatrick*, 427 U.S. at 451-457.

[26] Indeed, the reasonableness of Congress's selection of RFRA to enforce the free exercise and equal protection guarantees is evidenced by the fact that (i) for 30 years this Court and the lower courts applied the same test to enforce the Free Exercise Clause, and (ii) numerous States employ the same test to protect religious exercise under their own constitutions and laws. See *State* v. *Miller*, 549 N.W.2d 235, 241 (Wis. 1996); *Swanner* v.

a. *RFRA deters governmental violations of the free exercise guarantee*

Legislation that regulates "some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons" violates the First and Fourteenth Amendments. *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993). By limiting government's ability to apply general laws to individual religious exercise, RFRA establishes a bulwark against the deliberate handicapping of religion by government.

Congress heard extensive testimony documenting the risk that facially neutral laws can be used as a guise for intentional religious discrimination. See, *e.g.*, H.R. Rep. No. 88 at 2 ("facially neutral laws of general applicability have nefariously burdened the free exercise of religion in the United States throughout American history") (citing testimony); S. Rep. No. 111 at 4-5 & nn.2-3 (citing *Lukumi* and testimony regarding abusive uses of laws).[27] Contemporary case law corroborates this con-

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Anchorage Equal Rights Comm'n, 874 P.2d 274, 280-281 (Alaska), cert. denied, 115 S. Ct. 460 (1994); *Attorney General* v. *Desilets*, 636 N.E.2d 233, 235-236 (Mass. 1994); *Hunt* v. *Hunt*, 648 A.2d 843, 853 (Vt. 1994); *In re Dubreuil*, 629 So. 2d 819, 822 (Fla. 1993); *First Covenant Church* v. *City of Seattle*, 840 P.2d 174, 185-187 (Wash. 1992); *Rupert* v. *City of Portland*, 605 A.2d 63, 65-66 (Me. 1992) (applying compelling interest test to analyze claim under state constitution); *St. John's Lutheran Church* v. *State Compensation Ins. Fund*, 830 P.2d 1271, 1276 (Mont. 1992) (applying compelling interest test without discussing *Smith*); *State* v. *Hershberger*, 462 N.W.2d 393, 396-398 (Minn. 1990); *State* v. *Evans*, 796 P.2d 178, 180 (Kan. Ct. App. 1990) (applying compelling interest test without discussing *Smith*); *In re Brown*, 478 So. 2d 1033, 1039 & n.5 (Miss. 1985); *Porth* v. *Roman Catholic Diocese*, 532 N.W.2d 195, 199 (Mich. Ct. App. 1995); R.I. Gen. Laws § 42-80.1-3(b) (1993); cf. *State ex rel. Swann* v. *Pack*, 527 S.W.2d 99, 111 (Tenn. 1975) (state constitutional protection of religion is "substantially stronger" than federal constitutional protection), cert. denied, 424 U.S. 954 (1976).

[27] *1992 Senate Hearing* 68-71 (discussing how "neutral" laws can be and have been historically used in this country as instru-

cern.[28] By subjecting governmental rules that substantially burden religious exercise to heightened scrutiny, RFRA protects against those "subtle departures from neutrality" that the First Amendment condemns. Compare *Lukumi*, 508 U.S. at 534, with *Smith*, 494 U.S. at 889 (lower court decision in *Lukumi* cited as example of generally applicable law).

RFRA, moreover, relieves plaintiffs of having to undertake the difficult task of proving legislative bias or the improper targeting of religion in order to vindicate their free exercise rights. H.R. Rep. No. 88 at 6 (noting difficulty of uncovering improper legislative motive when reviewing facially neutral law); *1992 Senate Hearing* 69-71; 139 Cong. Rec. H2361 (May 11, 1993) (Rep. Orton); *id.* at H2357 (Rep. Edwards). This Court has upheld Section 5 legislation designed to eliminate such heavy burdens of proof.[29]

b. *RFRA protects the free exercise and equal protection rights of minority religions*

RFRA not only protects against governmental action that impermissibly targets religious exercise; it also pro-

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ments of religious persecution, citing as examples laws used to suppress Catholics, Mormons, and Jehovah's Witnesses).

[28] See, *e.g.*, *Lukumi*, 508 U.S. at 533-542; *LeBlanc-Sternberg* v. *Fletcher*, 67 F.3d 412 (2d Cir. 1995) (zoning), cert. denied, 116 S. Ct. 2546 (1996); *Islamic Ctr. of Mississippi, Inc.* v. *City of Starkville*, 840 F.2d 293 (5th Cir. 1988) (zoning); see also *Brown* v. *Borough of Mahaffey*, 35 F.3d 846 (3d Cir. 1994); *Abierta* v. *City of Chicago*, No. 96 C 3487, 1996 WL 714538 (N.D. Ill. Dec. 6, 1996) (zoning); *Rader* v. *Johnston*, 924 F. Supp. 1540 (D. Neb. 1996); see also *Church of Jesus Christ of Latter-Day Saints* v. *Jefferson County*, 741 F. Supp. 1522, 1534 (N.D. Ala. 1990); *Congregation Comm., Jehovah's Witnesses* v. *City Council of Haltom City*, 287 S.W.2d 700, 704 (Tex. Civ. App. 1956).

[29] See *Rome*, 446 U.S. at 174; *South Carolina* v. *Katzenbach*, 383 U.S. at 328; see also *Mississippi Republican Executive Comm.* v. *Brooks*, 469 U.S. 1002 (1984) (mem.) (summarily affirming constitutionality of Voting Rights Act Amendments of 1982); *Fitzpatrick*, 427 U.S. at 451-456 (Title VII).

phylactically deters discrimination against religious adherents, and, in particular, members of minority faiths. Witnesses before Congress testified that facially neutral, generally applicable laws are often used as vehicles for discrimination against minority religious groups. See *1992 Senate Hearing* 69-71 (surveying historic treatment of religious minorities under neutral laws and persecution it has inspired).[30] In light of that record, Congress could reasonably conclude that, to protect minority faiths, more exacting scrutiny is needed of laws that burden religious practice. Requiring that government act in such a particularized and careful manner is an appropriate exercise of congressional power. See *EEOC* v. *Wyoming*, 460 U.S. at 239 (requiring States "to achieve [their] goals in a more individualized and careful manner"); *Morgan*, 384 U.S. at 655 n.15 ("States can be required to tailor carefully the means of satisfying a legitimate state interest when fundamental liberties and rights are threatened.").

RFRA further enforces the Fourteenth Amendment's free exercise and equal protection guarantees by ensuring that religious minorities will not be disproportionately subjected to burdens on their exercise of religion. Because minority religions often lack the political power to obtain accommodations, Congress concluded that legislation was needed to preserve for them the same religious freedom enjoyed by more established faiths. S. Rep. No. 111 at 8; H.R. Rep. No. 88 at 6. The legislative history reveals widespread concern that *Smith* would dispropor-

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[30] See also *1992 Senate Hearing* 5-7, 27 (Hmongs), 30-39 (Mormons), 63-64; *1992 House Hearings* 11, 23-25 (Mormons), 104 ("It is the minority religions, the unpopular religions, the new religions that are going to be discriminated against."), 107-108, 157-158 (Jews, Amish, Muslims), 326 (legislative exemption process "will turn out to be discriminatory"), 332-338 (historic use of neutral laws to "fan[] the flames of persecution" and contemporary examples of *Smith*'s harsh application to Jehovah's Witnesses, Jews, Mormons), 398, 406-408 (Quakers and Native Americans).

tionately impact religious minorities. See *1992 Senate Hearing* 74 (after *Smith*, "there is a widespread impression that religious minorities simply have no constitutional rights any more"); *1992 House Hearings* 326 (without RFRA, legislative exemption process will not operate in an evenhanded manner).[31] Indeed, in *Smith* this Court acknowledged that its rule "will place at a relative disadvantage those religious practices that are not widely engaged in." 494 U.S. at 890. RFRA prevents that inequity from materializing, and thus accomplishes that "perfect equality of civil rights and the equal protection of the laws" that lies at the heart of Congress's Section 5 power. *Ex parte Virginia*, 100 U.S. at 345-346; see also *Lukumi*, 508 U.S. at 561-562 (Souter, J., concurring) (strict scrutiny of governmental action that substantially burdens religion promotes "substantive neutrality").[32]

In short, Congress's Section 5 power "include[s] the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." *Croson*, 488 U.S. at

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[31] See also *1992 Senate Hearing* 5-7, 27 (Hmongs' exercise of animism), 30-39 (Mormons), 63-64, 69-71, 129; *1992 House Hearings* 11, 23-25 (Mormons), 104, 107-108 (Hmongs), 150, 157-158 (impact of *Smith* on Jews, Amish, Muslims), 332-338, 398, 406-408 (Quakers and Native Americans); *Religious Freedom Restoration Act of 1990: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 28 (1990) (*1990 House Hearing*); 139 Cong. Rec. H2361-H2362 (May 11, 1993).

[32] By proscribing governmental action with a discriminatory impact, RFRA parallels Title VII and the 1982 amendments to the Voting Rights Act. See *Thornburg* v. *Gingles*, 478 U.S. 30, 35 (1986); *Griggs*, 401 U.S. at 431, 432 (Title VII bars employment practices that are "discriminatory in operation" and act as "'built-in headwinds' for minority groups"); see also *Bush* v. *Vera*, 116 S. Ct. 1941, 1969 (1996) (O'Connor, J., concurring) ("The results test of § 2 [of the Voting Rights Act] is an important part of the apparatus chosen by Congress to effectuate this Nation's commitment" to equality in voting.).

490 (opinion of O'Connor, J.) (emphasis in original). The legislative record compiled by Congress amply documents the concern that: (i) religious groups have, in the past, been subjected to persecution through general laws; (ii) discrimination on the basis of religion continues to this day; (iii) such discrimination can and often has occurred through the guise of facially neutral laws; (iv) the difficulty of proving that a legislature was biased against or otherwise targeted religion frequently poses an insurmountable barrier to the vindication of free exercise and equal protection rights; and (v) even well-intentioned legislatures may not adequately protect religious minorities. Congress thus reasonably concluded that the prophylactic imposition of a limited accommodation requirement is necessary to protect against religious discrimination and to guarantee equal opportunity for religious exercise. That is precisely what Section 5 empowers Congress to do.[33]

c. *RFRA deters governmental action that has the effect of impeding religious exercise*

Even when the Constitution prohibits only governmental action that intentionally interferes with Fourteenth

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[33] RFRA is similar in this respect to Congress's enactment of Title VII, which, in addition to proscribing race and sex discrimination, forbids discrimination on the basis of religion. 42 U.S.C. 2000e-2(a). In bringing religion within Title VII's shield, "Congress was understandably motivated by a desire to assure the individual additional opportunity to observe religious practices." *Ansonia*, 479 U.S. at 70. To that end, Title VII imposes an affirmative obligation on States as employers to accommodate religious exercise, unless to do so would result in "undue hardship." 42 U.S.C. 2000e(j); see also *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 71-75 (1977). This Court has upheld the application of Title VII to the States as an exercise of the Section 5 power. *Fitzpatrick*, 427 U.S. at 453-456 & n.9 (gender discrimination); see also *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703, 712 (1985) (O'Connor, J., concurring) (requiring reasonable accommodation of religious practitioners is a proper component of an anti-discrimination law).

Amendment rights, Section 5 permits Congress to go further and prohibit conduct that has the effect of substantially burdening and impeding the exercise of those liberties. *Fullilove*, 448 U.S. at 477-478 (opinion of Burger, C.J.); *Rome*, 446 U.S. at 177 (Congress may prohibit state conduct with discriminatory effects that "create[s] the risk" that constitutional rights will be infringed); see also *Thornburg* v. *Gingles*, 478 U.S. 30, 35 (1986).

Even absent the intentional targeting of religion, laws of general applicability can have the effect of interfering with and deterring the free exercise of religion. See, *e.g.*, *Smith*, 494 U.S. at 901 (O'Connor, J., concurring in the judgment) ("There is nothing talismanic about neutral laws of general applicability[.] * * * [They] can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion.").[34] RFRA's legislative history is replete with evidence that the government's failure to accommodate religious practices under neutral laws can strike at the core of religion and an individual's ability to adhere to tenets of the faith.[35]

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[34] See also *Thomas* v. *Review Bd.*, 450 U.S. 707, 717-718 (1981); *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963) (general rule "puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship").

[35] See S. Rep. No. 111 at 4-5, 8 & n.13 (*Smith* "has created a climate in which the free exercise of religion is jeopardized," noting as examples autopsies performed on Jews despite deep religious objections); H.R. Rep. No. 88 at 6 n.14 (autopsy performed on member of Hmong religion violated strongly held religious convictions of family); *1992 Senate Hearing* 5-6, 63 (deleterious impact of general, neutral laws, such as autopsy requirement and education rules, on Hmongs, Catholics, Mormons, and Jehovah's Witnesses); *1992 House Hearings* 17-18, 24-25, 123, 408 (neutral laws governing vehicular traffic, school students, and employment impede religious practices of Amish, Jehovah's Witnesses, Catholics, Mormons, and Native Americans); 139 Cong. Rec. E1234 (May 12, 1993) (Rep. Cardin) ("Veterans have been denied the right to be buried in some veterans' cemeteries on Saturday and Sunday even if their religious beliefs required it.").

Congress determined that "[i]t is not feasible to combat the burdens of generally applicable laws on religion by relying upon the political process for the enactment of separate religious exemptions in every Federal, State, and local statute." H.R. Rep. No. 88 at 6; accord S. Rep. No. 111 at 8 ("State and local legislative bodies cannot be relied upon to craft exceptions from laws of general application to protect the ability of the religious minorities to practice their faiths.").[36] Evidence before Congress, moreover, affirmed the need for a uniform, national response to this problem.[37]

Thus, just as this Court has done in other instances, Congress determined that a Fourteenth Amendment liberty "need[s] breathing space to survive." *NAACP* v. *Button*, 371 U.S. 415, 433 (1963); cf. *Dombrowski* v. *Pfister*, 380 U.S. 479, 494 (1965). *Smith* did not alter the status of the free exercise guarantee as a fundamental liberty secured by the Fourteenth Amendment; it simply changed the point at which government must yield to that interest. See *Smith*, 494 U.S. at 886 n.3. RFRA, like the Voting Rights Act and Title VII, moves that point back by focusing on effect rather than intent. Compare *Washington* v. *Davis*, 426 U.S. 229 (1976), and *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980), with *Connecticut* v. *Teal*, 457 U.S. 440 (1982), and *Rome*, 446 U.S. at 173-178. This is an appropriate means of enforcing the Fourteenth Amendment's free exercise guarantee. *Wallace*, 472 U.S. at 83 (O'Connor, J., concurring in the judgment) ("[G]overnment pursues Free Exercise Clause values when it lifts a government-imposed burden on the free exercise of religion.").

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[36] See also *1992 Senate Hearing* 64, 95-96, 129; *1992 House Hearings* 11, 25, 104, 123, 150, 357, 398.

[37] *1990 House Hearing* 78 ("Because of the size and diversity of the national polity, Congress can provide more reliable majoritarian protection for individual rights than the states can provide."); cf. *Croson*, 488 U.S. at 522-523 (Scalia, J., concurring in the judgment) (noting greater risk of discrimination at local and state level than federal level); The Federalist No. 10 (J. Madison).

In sum, the legislative judgments underlying RFRA reflect Congress's unique capacity to evaluate the problems surrounding religious exercise from a national perspective, place them in historical context, and determine facts and weigh competing policy considerations. Because Congress bears primary responsibility for enforcing the Fourteenth Amendment, "significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." *United States* v. *Gainey*, 380 U.S. 63, 67 (1965).

3. *RFRA Infringes No Other Constitutional Rights*

As discussed below, RFRA does not transgress or diminish other constitutional rights. Thus, each prong of the *Morgan* test is satisfied.[38]

II. RFRA FULLY COMPORTS WITH THE SEPARATION OF POWERS

As an appropriate exercise of Congress's authority under Section 5 of the Fourteenth Amendment to enhance statutorily the protection afforded constitutional guarantees, RFRA does not unconstitutionally erode the independence of the judiciary. The separation of powers

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[38] In addition to being an appropriate exercise of Congress's Section 5 power, RFRA is a constitutionally proper exercise of Congress's Article I, Section 8, power to the extent that RFRA regulates federal law (*EEOC* v. *Catholic Univ.*, 83 F.3d at 469-470), applies to the States as a condition on a spending program enacted under Congress's spending power, or reflects an as-applied exercise of the Commerce Clause power. See S. Rep. No. 111 at 13-14; H.R. Rep. No. 88 at 9; Rex E. Lee, *The Religious Freedom Restoration Act: Legislative Choice and Judicial Review*, 1993 B.Y.U. L. Rev. 73, 90 n.79. RFRA is also constitutional in all those cases where its protections duplicate those provided by the federal Constitution. See *Smith*, 494 U.S. at 881-885. Finally, RFRA applies to the amici Territories of American Samoa, Guam, and the Virgin Islands, through Congress's plenary power under Article IV, Section 3, Clause 2. *National Bank* v. *County of Yankton*, 101 U.S. 129, 132-133 (1880).

doctrine precludes the Executive and Legislative Branches from reviewing and revising specific judgments of the federal courts, and assigns to this Court authority to interpret the Constitution in furtherance of resolving cases and controversies within its jurisdiction. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803); see also *Plaut* v. *Spendthrift Farm, Inc.*, 115 S. Ct. 1447 (1995). RFRA transgresses none of those bounds.

A. RFRA Creates A Distinct Statutory Right

Nothing in RFRA permits Congress or the Executive to review specific decisions of federal courts. Nor did Congress purport to overturn this Court's constitutional holdings. To the contrary, Congress repeatedly disavowed any effort to review or reverse this Court's decision in *Smith* or any other case:

> While the act is intended to enforce the right guaranteed by the free exercise clause of the first amendment, it does not purport to legislate the standard of review to be applied by the Federal courts in cases brought under that constitutional provision. Instead, it creates a new statutory prohibition on governmental action that substantially burdens the free exercise of religion.

S. Rep. No. 111 at 14 n.43.[39] Thus, as numerous courts have recognized, RFRA does not purport to alter the scope of the First Amendment or create new constitu-

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[39] See also H.R. Rep. No. 88 at 15 n.3 ("Of course, the label 'restoration' in this context is inappropriate. Congress writes laws —it does not and cannot overrule the Supreme Court's interpretation of the Constitution and thus it is unable to 'restore' a prior interpretation of the First Amendment.") (additional views); *id.* at 7 ("[T]he Committee neither approves nor disapproves of the result in any particular court decision * * *. This bill is not a codification of any prior free exercise decision but rather the restoration of the legal standard that was applied in those decisions."); 139 Cong. Rec. H2358 (May 11, 1993) (Rep. Hyde); 137 Cong. Rec. E2422 (June 27, 1991) (Rep. Solarz).

tional rights; rather, RFRA creates a distinct statutory right by increasing the protection accorded an established Fourteenth Amendment guarantee.[40] Further, RFRA does not affect the authority or duty of the courts to say what the Constitution requires. It simply adds an additional statutory requirement for the courts to interpret and apply.

B. The Separation Of Powers Doctrine Permits Congress To Enact Statutes Reimposing Standards Of Scrutiny That Are Not Constitutionally Compelled

Legislative enactments that, like RFRA, respond to decisions of this Court by creating enhanced statutory rights are commonplace and consistent with the separation of powers doctrine. In *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980), for example, a plurality of the Court held that a voting practice's discriminatory effect, standing alone, does not violate the Fourteenth Amendment. *Id.* at 65-80 (opinion of Stewart, J.). In response to *Bolden*'s delineation of the scope of the Equal Protection Clause, Congress amended the Voting Rights Act to "make clear that a violation could be proved by showing discriminatory effect alone" and expressly reestablished as a matter of statutory law the legal standard employed by this Court in earlier equal protection cases, such as *White* v. *Regester*, 412 U.S. 755 (1973). See *Gingles*, 478 U.S. at 35; see also S. Rep. No. 417, 97th Cong., 2d Sess. 27 (1982) (legislation meant to "restore the pre-*Mobile* [v. *Bolden*] legal standard"); *Morse* v. *Republican Party*, 116 S. Ct. 1186, 1205 n.30 (1996) (opinion of Stevens, J., joined by Ginsburg, J.). Acknowl-

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[40] See *Sasnett*, 91 F.3d at 1020; *Bauer*, 84 F.3d at 1558; *EEOC* v. *Catholic Univ.*, 83 F.3d at 469; *Goodall* v. *Stafford County Sch. Bd.*, 60 F.3d 168, 171 (4th Cir. 1995), cert. denied, 116 S. Ct. 706 (1996); *Werner* v. *McCotter*, 49 F.3d 1476, 1479 (10th Cir.), cert. denied, 115 S. Ct. 2625 (1995); see also *Swanner*, 115 S. Ct. at 460 n.1 (Thomas, J., dissenting from denial of certiorari).

edging that Congress's action "was largely a response to this Court's plurality opinion in [*Bolden*]," the Court has enforced the statutory right for nearly 15 years without voicing any separation of powers concerns. *Gingles*, 478 U.S. at 35; see also *Mississippi Republican Executive Comm.* v. *Brooks*, 469 U.S. 1002 (1984) (mem.); *Bush* v. *Vera*, 116 S. Ct. 1941, 1968 (1996) (O'Connor, J., concurring) (noting unanimity of lower court decisions sustaining the Act). Like RFRA, the post-*Bolden* voting rights legislation

> does not purport to usurp the judicial role of defining the substantive scope of the fourteenth amendment or the fifteenth amendment. Instead, Congress seeks to protect the core values of these amendments through a remedial scheme that invalidates election systems that, although constitutionally permissible, might debase the amendments' guarantees.

Jones v. *City of Lubbock*, 727 F.2d 364, 373 (5th Cir. 1984).

Likewise, in *Washington* v. *Davis*, this Court held that only intentional discrimination in public employment violates the Equal Protection Clause. 426 U.S. at 238-248. Congress has nevertheless imposed upon employers, through Title VII, the discriminatory impact test that this Court rejected as a constitutional matter in *Davis*. See *Teal*, 457 U.S. at 445-456; *Griggs*, 401 U.S. at 429-436; see also *Fitzpatrick*, 427 U.S. at 453-456 & n.9.[41]

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[41] See also *Rome*, 446 U.S. at 173-178 (upholding statutory prohibition on voting practices with discriminatory effects and requirement of heightened scrutiny through preclearance process, despite ruling that same day that only intentional discrimination violates Fifteenth Amendment); 10 U.S.C. 774 (in response to *Goldman* v. *Weinberger*, 475 U.S. 503 (1986), legislation increasing protection for religious objections to military uniform restrictions); 42 U.S.C. 2000aa (in response to *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978), legislation immunizing the press from certain searches). While Section 5 permits Congress to impose additional scrutiny of governmental action to enforce Fourteenth Amendment rights, Congress clearly could not exercise its Section 5 power to undercut

Nor does the fact that, in the course of passing RFRA, members of Congress criticized the *Smith* decision have any bearing on the separation of powers. Congress's authority to legislate does not depend upon its agreement with this Court's decisions. Cf. S. Rep. No. 417 at 2-43 (criticizing *Bolden* decision in enacting the Voting Rights Act Amendments of 1982). In fact, dialogue between Congress and this Court about what the Constitution compels, and what society as a practical matter requires, to protect constitutional rights, is precisely what the separation of powers doctrine in general, and Section 5 in particular, envision.

> All branches of government are, and ought to be, guardians of the Constitution. It is no encroachment upon the private preserve of the Judicial Branch for the Congress to undertake implementation of the First Amendment; it is the duty of Congress to do so. The Judiciary must be the final arbiter, but it is not the sole provider of freedom under the Bill of Rights.

Muir v. *Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1046 n.31 (5th Cir. 1982) (en banc), cert. denied, 460 U.S. 1023 (1983).

Petitioner's separation of powers argument proceeds from the mistaken assumption that, in *Smith*, this Court articulated not just a constitutional floor on how little, but also a ceiling on how much, government can accommodate religion. Quite the opposite, *Smith* expressly anticipated a legislative response to its decision:

> Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society

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a constitutionally compelled standard of scrutiny. See *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 732 (1982).

> that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.

494 U.S. at 890. Congress's decision to enhance the "protection accorded to religious belief" on a nationwide basis thus does not amount to the type of legislative encroachment with which the separation of powers doctrine is concerned.[42]

III. RFRA IS CONSISTENT WITH THE ESTABLISHMENT CLAUSE

RFRA fully comports with the Establishment Clause because it is a calibrated legislative accommodation of religion that promotes religious equality. "The limits of permissible state accommodation to religions are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Walz* v. *Tax Comm'n*, 397 U.S. 664, 673 (1970). Rather, government may "respect[] the religious nature of our people and accommodate[] the public service to their spiritual needs." *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952). Whatever the outer limits of permissible accommodation, this Court's precedents demonstrate that the lifting of substantial, governmentally imposed burdens on religion in a sectarian-neutral manner does not run afoul of the Establishment Clause. *Corporation of the Presiding Bishop* v. *Amos*, 483 U.S. 327 (1987), which petitioner does not discuss, directly demonstrates RFRA's consonance with that

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[42] Courts clearly possess the institutional competence to administer RFRA's test. Strict scrutiny continues to govern hybrid constitutional claims and cases where government either intentionally targets religion or provides for individualized consideration of claims in its statutory scheme. See *Lukumi*, 508 U.S. at 533; *Smith*, 494 U.S. at 881-885. Courts also must inquire into the existence of a substantial or "significant" burden on religious exercise when deciding whether religious accommodations comport with the Establishment Clause. *E.g.*, *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 15 (1989) (opinion of Brennan, J.).

Clause. Petitioner's argument, by contrast, would require the invalidation of every state constitution and law that, like RFRA, imposes heightened protection for the exercise of religion beyond the *Smith* floor, without providing equivalent protection for non-religious beliefs. See n.26, *supra*.[43]

A. RFRA has a secular legislative purpose. The alleviation of significant governmental interference with religious exercise is a permissible secular purpose, as long as Congress does not "abandon[] neutrality and act[] with the intent of promoting a particular point of view in religious matters." *Amos*, 483 U.S. at 335; see also *Kiryas Joel*, 114 S. Ct. at 2497 (O'Connor, J., concurring in part and concurring in the judgment) ("What makes accommodation permissible, even praiseworthy, is * * *

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[43] Petitioner's suggestion (Br. 45-49) that RFRA violates the Establishment Clause, but that identical legislation enacted by a State would not, is wrong. "This Court has confirmed and endorsed th[e] elementary proposition of law time and time again" that the Fourteenth Amendment "impose[s] the same substantive limitations on the States' power to legislate that the First Amendment ha[s] always imposed on the Congress' power." *Wallace*, 472 U.S. at 49; see also *McIntyre* v. *Ohio Elections Comm'n*, 115 S. Ct. 1511, 1514 n.1 (1995); Stevens, *A Century of Progress*, 59 U. Chi. L. Rev. at 25-30. Amicus Clarendon's related argument (Br. 25-28) that the phrasing of the Establishment Clause uniquely disables Congress from enforcing the Fourteenth Amendment's free exercise guarantee is incorrect. First, as noted, properly constructed accommodation statutes like RFRA are not laws "respecting" an establishment of religion. There is no basis in constitutional text, history, or logic for concluding that the Establishment Clause applies with greater disabling force to Section 5 legislation than to legislation passed pursuant to any of Congress's other enumerated powers. Second, the Fourteenth Amendment is itself an amendment to the Constitution and thus must at least stand on equal footing with earlier amendments. Cf. *Seminole Tribe* v. *Florida*, 116 S. Ct. 1114, 1125-1132 (1996). Third, if adopted, amici's argument would call into question countless other federal laws protecting religious exercise, such as Title VII, the Fair Housing Act, and the sacramental wine exemption from Prohibition (National Prohibition Act, ch. 85, Tit. II, § 3, 41 Stat. 308).

that the government is accommodating a deeply held belief."); *Lee* v. *Weisman*, 505 U.S. 577, 628-629 (1992) (Souter, J., concurring). Congress's purpose in enacting RFRA was to advance uniformly the civil rights of all religious adherents; Congress played no favorities. Cf. *Kiryas Joel*, 114 S. Ct. at 2493; *id.* at 2497 (O'Connor, J., concurring in part and concurring in the judgment). Furthermore, by limiting RFRA to instances in which governmental conduct "substantially burden[s]" religious exercise, 42 U.S.C. 2000bb-1, Congress acted only "to alleviate significant governmental interference" with religious autonomy and exercise. *Amos*, 483 U.S. at 335; *Lee*, 505 U.S. at 629 (Souter, J., concurring); cf. *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 15 (1989) (opinion of Brennan, J.). Under these circumstances, the Establishment Clause does not "require that the exemption come packaged with benefits to secular entities." *Amos*, 483 U.S. at 338.[44]

B. RFRA also has a permissible primary effect. "A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon* [v. *Kurtzman*, 403 U.S. 602 (1971], it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Amos*, 483 U.S. at 337 (emphasis in original). Thus, exemptions from generally applicable statutes do not constitute impermissible governmental facilitation of religion, because the government neither adds to nor subsidizes the propagation of the religious message. *Ibid.*

As in *Amos*, nothing in RFRA results in the direct advancement or subsidization of religion. RFRA requires only that, on occasion, government must leave religion to

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[44] See also *Kiryas Joel*, 114 S. Ct. at 2497 (O'Connor, J., concurring in part and concurring in the judgment) ("Accommodations may thus justify treating those who share this belief differently from those who do not.").

operate in its own sphere by exempting persons from generally applicable obligations that substantially burden their religious exercise. See *Kiryas Joel*, 114 S. Ct. at 2493 (permissible accommodations "have allowed religious communities and institutions to pursue their own interests free from governmental interference"). Under RFRA, religious practitioners will not be any better off than before coming into contact with the State; they will simply be less worse off because of the interaction.[45]

C. Finally, RFRA does not impermissibly entangle the religious and the secular. Religious exemptions, as a whole, decrease governmental involvement with religion. *Amos*, 483 U.S. at 339; see also *Kiryas Joel*, 114 S. Ct. at 2493. Like the provision of Title VII at issue in *Amos*, RFRA "effectuates a more complete separation of" government and religious practitioners and avoids the "intrusive inquiry" into religious doctrine and practices entailed by efforts to regulate religious conduct. *Amos*, 483 U.S. at 339; see also J.A. 14, 47 (petitioner and respondent Archbishop Flores agree that involving government in the design of the new sanctuary entangles the City in the Church's affairs).

RFRA, moreover, promotes Establishment Clause values by ensuring that governmental accommodations are equally available to all religions whose faith is substantially burdened by government. By contrast, the piece-

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[45] Unlike the sabbatarian exemption at issue in *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703 (1985), RFRA lifts a governmentally imposed burden on religious exercise, rather than a burden imposed by private parties, and it does so only when the burden is demonstrated to be "substantial." *Id.* at 712 (O'Connor, J., concurring). RFRA, moreover, does not impose an absolute command of accommodation, regardless of the cost to the government or third parties. Cf. *id.* at 709-710 (majority opinion). Rather, through the compelling interest test, RFRA factors the countervailing interests of the government and any burden on third parties into the accommodation calculus. Moreover, RFRA protects all substantially burdened religious beliefs equally. *Id.* at 711-712 (O'Connor, J., concurring).

meal exemption process that petitioner proposes creates a substantial risk that accommodations will not be provided in an even-handed manner. "[T]he legislature itself may fail to exercise governmental authority in a religiously neutral way. * * * [W]e have no assurance that the next similarly situated group seeking [an accommodation] of its own will receive one." *Kiryas Joel*, 114 S. Ct. at 2491; see also *id.* at 2497 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 2504 (Kennedy, J., concurring in the judgment); *United States* v. *Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring in the judgment) ("The risk that governmental approval of some and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude."). RFRA thus promotes important Establishment Clause principles.

IV. RFRA IS CONSISTENT WITH PRINCIPLES OF FEDERALISM

Petitioner contends that "principles of federalism" preclude Congress from requiring States and local governments to adhere to reasonable federal standards designed to enforce Fourteenth Amendment rights. Ample precedent says otherwise. Indeed, RFRA is more responsive to federalism concerns than other Section 5 legislation sustained by this Court.

A. This Court has repeatedly rejected Tenth Amendment challenges to legislation enacted pursuant to the Section 5 power.[46] The Civil War Amendments " 'were

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[46] See, *e.g.*, *Gregory* v. *Ashcroft*, 501 U.S. 452, 468 (1991) (federalism principles "are attenuated when Congress acts pursuant to its powers to enforce the Civil War Amendments"); *EEOC* v. *Wyoming*, 460 U.S. at 243 n.18 ("[W]hen properly exercising its power under § 5, Congress is not limited by the same Tenth Amendment constraints that circumscribe the exercise of its Commerce Clause powers."); *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 67 (1980); *Rome*, 446 U.S. at 179.

specifically designed as an expansion of federal power and an intrusion on state sovereignty.' * * * By its terms, the Fourteenth Amendment contemplates interference with state authority." *Gregory* v. *Ashcroft*, 501 U.S. 452, 468 (1991) (quoting *Rome*, 446 U.S. at 179); see also *Ex parte Virginia*, 100 U.S. at 346. Because the Constitution does not textually commit zoning matters or religious regulation to the States, RFRA implicates only the general reserve of state authority that is fully subject to Congress's Section 5 power. See *Gregory*, 501 U.S. at 468-470; *EEOC* v. *Wyoming*, 460 U.S. at 239-242; *Ex parte Virginia*, 100 U.S. at 346; cf. *Oregon*, 400 U.S. at 124-131 (Black, J.). Accordingly, "principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments." *Rome*, 446 U.S. at 179; see also *Seminole Tribe* v. *Florida*, 116 S. Ct. 1114, 1125 (1996).

B. In any event, RFRA leaves petitioner free to pursue its underlying goals and programs, including zoning regulation. Petitioner's "discretion to achieve its goals *in the way it thinks best* is not being overridden entirely, but is merely being tested against a reasonable federal standard." *EEOC* v. *Wyoming*, 460 U.S. at 240 (emphasis in original).[47] RFRA, moreover, is a calibrated and measured limitation on state action. It imposes no flat prohibitions or blanket rules. Rather, Congress simply legislated a statutory standard with which courts and States are already familiar, and which balances States' interests against the individual's religious liberty. See *Smith*, 494 U.S. at 902 (O'Connor, J., concurring in the judgment) (compelling interest test "strike[s] sensible balances be-

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[47] See also *South Carolina* v. *Baker*, 485 U.S. 505, 514-515 (1988) ("That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect."); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981).

tween religious liberty and competing state interests"); 139 Cong. Rec. S14,351-S14,352 (Oct. 26, 1993) (13 State Attorneys General advise that RFRA "strikes a proper balance").[48] As such, RFRA is more solicitous of state prerogatives than other requirements that have been upheld against federalism challenges as permissible exercises of Congress's Section 5 authority (for example, literacy test bans and voting preclearance obligations). "Put another way, the Act requires the State to achieve its goals in a more individualized and careful manner than would otherwise be the case, but it does not require the State to abandon those goals, or to abandon the public policy decisions underlying them." *EEOC* v. *Wyoming*, 460 U.S. at 239 (upholding imposition of heightened scrutiny on States during era of *National League of Cities* v. *Usery*, 426 U.S. 833 (1976)). Only a "substantial" burden on religious exercise triggers RFRA, and the identification of a compelling interest and narrow tailoring will leave the State free to apply its laws as before.[49]

Because the compelling interest inquiry is a context-specific one, RFRA does not dictate a uniform, national answer to the problem of religious accommodation. It instead allows for variation and experimentation among States in light of their unique interests, history, and circumstances. RFRA does "not guarantee that religious claimants bringing free exercise challenges will win, but only that they have a chance to fight." H.R. Rep. No. 88 at 17 (additional views); *id.* at 16 & n.5 (noting that,

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[48] See also n.26, *supra* (listing state laws that provide equivalent protection for religious exercise).

[49] Although petitioner makes much of the scope of RFRA's coverage (Br. 21), RFRA's balancing test pales in comparison to the breadth and depth of intrusion on States' autonomy accomplished by the Voting Rights Act and Civil Rights Acts. The most that RFRA demands is occasional exemptions from—not the general displacement of—state law.

prior to *Smith*, government won the majority of free exercise cases even though they were litigated under the compelling interest standard); cf. *Adarand Constructors, Inc.* v. *Peña*, 115 S. Ct. 2097, 2117 (1995) (strict scrutiny is not "strict in theory, but fatal in fact").

C. Petitioner's reliance on *New York* v. *United States*, 505 U.S. 144 (1992), is misplaced. *New York* struck down portions of a federal law that required States either to enact legislation for the disposal of radioactive waste or to take title to the waste. That scheme bears little resemblance to RFRA. First, *New York* addressed Congress's power to legislate under the Commerce Clause. The decision thus does not implicate established principles concerning the general inapplicability of federalism objections to Congress's use of its Section 5 power, which is a direct authority to regulate States. See pp. 44-45, *supra*; cf. *Seminole Tribe*, 116 S. Ct. at 1125.

Second, RFRA does not "commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *New York*, 505 U.S. at 176 (citation omitted). States need not undertake or forgo any particular regulatory activity. RFRA simply provides that whatever actions are undertaken that substantially affect religious freedom must be accomplished consistent with federal norms, just as States currently must conduct their affairs within the constraints of Title VII, the Age Discrimination in Employment Act, and the Voting Rights Act. See *EEOC* v. *Wyoming*, 460 U.S. at 236-243 & n.18; *Fitzpatrick*, 427 U.S. at 451-457.[50]

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[50] The State amici object (Br. 1-6, 24-25) to RFRA's application to prisons. In evaluating petitioner's facial challenge to RFRA, concerns about frivolous prisoner litigation should not be allowed to cap Congress's authority under the Fourteenth Amendment to protect the civil rights of the rest of society. Cf. *Salaam* v. *Lockhart*, 905 F.2d 1168, 1171 n.7 (8th Cir. 1990) (*Smith* "simply brings the free exercise rights of private citizens closer to those

Third, RFRA does not obscure political accountability for the costs of its enforcement. Indeed, the federal gov-

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of prisoners"), cert. denied, 498 U.S. 1026 (1991). Furthermore, the question of RFRA's applicability to prisons was the subject of specific and extensive debate. See 139 Cong. Rec. S14,350-S14,368 (Oct. 26, 1993), S14,461-S14,471 (Oct. 27, 1993); H.R. Rep. No. 88 at 8; S. Rep. No. 111 at 10. Cf. *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-552 (1985). While Congress ultimately agreed with 13 State Attorneys General that RFRA's balancing test should also apply in the prison context, Congress emphasized that courts should "continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." S. Rep. No. 111 at 10; see also H.R. Rep. No. at 8; 139 Cong. Rec. S14,361 (Oct. 26, 1993) (Sen. Hatch). That RFRA is sensitive to the unique conditions of the prison environment is demonstrated by the fact that, in every prison case cited by the State amici (Br. 4-5), the prison authorities prevailed. Of the 85 prison RFRA cases we are aware of that have gone to final judgment (based on a Westlaw search), prison authorities won 82. While the States object that they are still obliged to litigate RFRA claims, they do not contend that RFRA has increased the overall volume of prisoner litigation. Cf. 139 Cong. Rec. S14,464 (Oct. 27, 1993) (Sen. Coats) ("[p]risoner religious exercise suits were less than 1 percent of all prisoner civil rights cases in Ohio when RFRA's higher standard of review was in force"). Rather, in our experience, RFRA claims are almost invariably joined with other claims, so that the case would have to be litigated anyway. See *id.* at S14,363 (Oct. 26, 1993) (Sen. Hatch) (noting that an increase in prisoner filings followed the issuance of the *Smith* decision and that "prisoners are going to institute a large number of lawsuits regardless of the standard of review applicable to prison lawsuits * * * [b]ecause prisoners do not have many other things to do"). Finally, should real problems surface, Congress can impose procedural requirements that inhibit meritless prisoner filings. See Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, Tit. VIII, § 803(d), 110 Stat. 1321-71 (1996); 42 U.S.C. 1997e.

ernment is equally subject to RFRA's terms. Cf. *New York*, 505 U.S. at 182-183.[51] As a result, RFRA

> limit[s] the power of both federal and state governments in favor of safeguarding the fundamental rights and liberties of the individual. * * * [T]his promotes rather than undermines the basic policy of avoiding excess concentration of power in government, federal or state, which underlies our concepts of federalism.

Pointer v. *Texas*, 380 U.S. 400, 414 (1965) (Goldberg, J., concurring). "The Constitution does not protect the sovereignty of States for the benefit of the States or state governments * * *. [T]he Constitution divides authority between federal and state governments for the protection of individuals." *New York*, 505 U.S. at 181.

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[51] Petitioner objects that Congress could legislatively exempt itself from RFRA. Congress, however, went to great lengths to ensure RFRA's continued application to federal law. All federal laws are covered. 42 U.S.C. 2000bb-2, 2000bb-3(a). Future law is exempted only if both Houses and the President explicitly agree in the text of that legislation to exclude RFRA. 42 U.S.C. 2000bb-3(b). That is the same legislative process that is available to the States to obtain exemptions from or limitations on RFRA. Given that all Section 5 enforcement is through legislation and that one Congress cannot pass laws irrevocably binding subsequent Congresses (see *United States* v. *Winstar Corp.*, 116 S. Ct. 2432, 2453-2455 (1996) (opinion of Souter, J.)), Congress did all it could to ensure the federal government's own continued obligation to comply with RFRA's terms.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. The First, Tenth and Fourteenth Amendments to the United States Constitution provide, in pertinent part:

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

2. The Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*, provides:

§ 2000bb. Congressional findings and declaration of purposes

(a) Findings

The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are—

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

§ 2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

§ 2000bb-2. Definitions

As used in this chapter—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;

(2) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means the exercise of religion under the First Amendment to the Constitution.

§ 2000bb-3. Applicability

(a) In general

This chapter applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

§ 2000bb-4. Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting," used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

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